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IN THE

Supreme Court of the United States

OCTOBER TERM, 1929.

No. 389.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY,
Petitioner,
vs.
THE UNITED STATES.

BRIEF OF PETITIONER ON THE MERITS, SUPPLEMENTAL TO ITS BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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The petitioner's brief in support of the petition for a writ of certiorari to the Court of Claims covers the case on the merits to such an extent that a new and complete brief on the merits would involve much needless repetition and serve no useful purpose.

We desire, however, to amplify a few of the matters discussed in our earlier brief.

THE SIZE AND CHARACTER OF THE SWITCHBOARD.

For a clear understanding of the case, an appreciation of the size and character of the switchboard which forms the basis of the petitioner's claim is essential.

From June, 1908, until February, 1917, a three-position private branch exchange No. 4 switchboard contained in one room and with a capacity of only 280 lines, was more than sufficient to supply all of the telephone requirements of the War Department in the District of Columbia. During this entire period, the actual number of lines used by the Department increased from 180 to 257. (R. 17, Finding VI.)

Following the Mexican border troubles and the announcement by the German Government on January 31, 1917, of its policy with respect to unrestricted submarine warfare and the necessary pre-war activities of our Goverment, the telephone requirements of the War Department increased, and on March 23, 1917, a larger private branch exchange No. 4 switchboard, of five instead of three positions, was installed. (R. 17, Finding VII.) In August, 1917, four more positions were added. (R. 17, Finding VIII.)

As the telephone requirements of the War Department further increased and exceeded the capacity of the No. 4 type of private branch exchange switchboard, a different type, known as the No. 604 type of private branch exchange equipment, was installed on October 1, 1917, this time in two rooms instead of one, of the State, War and Navy Building. This Board had twelve operators positions and equipment for 1,000 lines. It was "the largest and most modern type of private branch exchange equipment then on the market." (R. 18, Finding IX.)

In the following months, additions were made to this board, and then, by various expedients, its capacity was further increased to 42 operators positions with equipment for 4,200 lines, the practical limit to which the equipment could be expanded, and even this required that many of the calls be handled by two operators instead of one and resulted in less speedy and less accurate service. (R. 18, Finding IX.)

It then became necessary, in order to meet the still increasing telephone requirements of the War Department, to change from the use of a private branch exchange type of switchboard to the type known as the central office type, which is the type used in the largest central telephone exchanges in the large cities. (R. 23, Finding XIV.)

The switchboard involved in this suit was of that type.

To house it required, not one or two rooms as sufficed for the previous boards, but an entire building, specially designed and constructed for that purpose, at a cost of $138,000.00. (R. 19, Finding XI.)

When first put in service, on June 22, 1918, this switchboard had 45 operators positions, with about 5,000 lines, and by the time of the Armistice this had been increased to 75 operators positions, with a corresponding increase in equipment. It had a much larger capacity than an ordinary private branch exchange switchboard and served 65 different buildings, located in various localities in the District of Columbia, where the War Department was housed. In addition it was connected by direct tie lines with the switchboards of nearly all the other Government Departments, and also directly with points outside Washington, some as far away as Ohio, thus putting the War

Department in direct communication with all these points without going through the central telephone exchange. It had a complete power plant of its own and was of sufficient capacity to serve as a telephone exchange for a city of 100,000 inhabitants. (R. 23, Finding XIV.) It cost the petitioner over $400,000.00, and this amount did not include the cost of all the additional telephones nor of the miles of wire to afford operation. (R. 28, Finding XXIX.)

For this switchboard, the Government contends that petitioner is entitled to compensation by way of rental at the rate of $24.00 per year, under the terms of the General Supply Contract in force at the time of its installation, and to no other compensation whatever except by way of the increases in annual rental charges at so much for each multiple jack in a switchboard, as provided in subsequent General Supply Contracts.

Whether the General Supply Contracts can have application to this switchboard must be determined by a consideration: first, of the provisions of Section 4 of the Act of June 17, 1910 (36 Stat. 468, 531), under authority of which the General Supply contracts were made, and then of the character and provisions of the contracts themselves.

SECTION 4 OF THE ACT OF JUNE 17, 1910.

This section is set forth in full and its meaning and intent discussed under Point A on pages 10 to 13 of our brief in support of the petition for certiorari.

In response to what we there said, the Government, in its brief in opposition to the petition for certiorari (pp. 10-11), urges that the switchboard in question forms a part of the telephone "service" for which, un-

der the section in question, the Secretary of the Treasury was given authority to contract, and that the limitations in this section as to the purchase of "articles" are not applicable.

It is true that the latter part of this section, after defining the manner in which the Secretary of the Treasury should advertise and contract for fuel, ice, stationery and other miscellaneous supplies in common use by or suitable to the ordinary needs of two or more departments or establishments of the Government, contains the following: "And provided further, that telephone service, electric light, and power service purchased or contracted for from companies or individuals shall be so obtained by him." From this, the Government argues that "the Secretary of the Treasury had sole authority to contract for such telephone service as was required by the various executive departments in Washington, including the War Department."

This contention, we respectfully submit, entirely ignores the setting in which this proviso was placed by Congress. The section in question, as clearly appears from its terms, was intended to standardize the purchase of those supplies in common use by or suitable to the ordinary needs of two or more departments or establishments of the Government in Washington; and, even in the case of such supplies, an exception to the requirement that they be advertised and contracted for by the Secretary of the Treasury was made in those cases where the public exigencies required the immediate delivery of the article. In other words, this section was never intended to apply to the purchase of any article of unusual character which might be needed by only a single department or establishment of the

Government, as to which there was no occasion for making general provisions as to its purchase, nor to any article the public need for which was so urgent that it would have been detrimental to the Government to have the delay of advertising for bids.

It can hardly be supposed that Congress placed in this section the proviso as to contracts for telephone service for the departments and establishments of the Government in the District of Columbia without the thought that there was a definite connection between such contracts, and contracts for supplies, such as fuel, ice, stationery and other miscellaneous supplies.

It is true that the contract for telephone service, as also contracts for electric light and power service, provide primarily for "service" rather than "articles"; but the proviso above quoted expressly says that such service "shall be so obtained" by the Secretary of the Treasury, that is, obtained by him in the same manner that he is authorized and required to obtain supplies in common use in two or more departments and establishments of the Government.

To say, therefore, that this section of the Act contemplated that the Secretary of the Treasury, under a general supply contract for telephone service for all of the departments and establishments of the Government in the District of Columbia, not only had the authority, but the sole authority, to contract for and require the furnishing by petitioner as speedily as might be possible, of the $400,000.00 switchboard at a rental of $24.00 per year, is to take the bare letter of the section and to ignore utterly and absolutely the fair and reasonable meaning and intent thereof.

It would be just as reasonable to say that, under the general supply contract of the electric power company

in the District of Columbia to furnish electric light and power to the various departments and establishments of the Government, the Department of Agriculture, for example, might require the furnishing of sufficient electric power to operate a huge plant for the fixation of atmospheric nitrogen, and one requiring such a large supply of electric power that the power company would be compelled to construct an additional power plant to care for it.

Even though the furnishing of such electric power might be said to be within the bare letter of the proviso of the section in question, it certainly could not be said fairly to have been contemplated by Congress nor to have been contemplated by the parties to the general supply contract for electric light and power.

The section in question is one which, just as much as a contract or a will, should be taken by the four corners and read as an entirety, and not by piecemeal; and, when so read, it is fully apparent that the vesting of authority in the Secretary of the Treasury to make general supply contracts, whether for articles or for service, was intended to relieve the various departments and establishments of the Government from the burden of, and to bring about standardization, uniformity and economy in, the purchase of supplies and service commonly and ordinarily needed for two or more departments or establishments.

This question, as to the proper construction to be given to the proviso of section 4 relating to telephone service, electric light and power service, was under consideration by the Attorney General, and, in his opinion of July 25, 1910, Vol. XXVIII, Opinions of Attorneys General, pages 380, 383 he said, in his discussion of this proviso:

"Second. What is the meaning of the final proviso which relates to telephone, electric light, and power service?

"The last word 'him' necessarily refers to the Secretary of the Treasury. He is the only single individual mentioned in the entire section, except where it is declared that the supply committee shall be composed of an officer from each department 'designated by the head thereof'; and it is apparent that 'him' can have no reference to the head of a department as such. The proviso, therefore, is that the Secretary of the Treasury shall 'so' obtain telephone and electric light and power service purchased or contracted for from companies or individuals; and the word 'so' can refer to nothing else than the method of contracting for other supplies, which is set forth in the preceding parts of the section; and when such services are contracted for they must be ordered as other supplies.

"The purpose of this provision was to concentrate in the hands of one individual the power to contract for the services mentioned for all of the departments and establishments, so that uniformity and the most advantageous rates could be secured."

THE GENERAL SUPPLY CONTRACTS.

The scope of the general supply contracts is discussed under point B in our previous brief, pages 13 and 14.

For the reasons there stated, and because, as just above discussed, the switchboard in question was not within the fair meaning or intent of section 4 of the Act of June 17, 1910, it cannot be within the meaning or intent of the general supply contracts, which were made under the authority of that section and were limited to the extent of the authority there defined.

We may observe further, however, that the general supply contract for the year ending June 30, 1918, the one which was in force when this switchboard was ordered, and was constructed, installed, and its use begun by the War Department, provided a rental of $24.00 per annum each for "Common battery private branch exchange switchboards, including one operator's set of telephones for each operator's position."

While the General Supply Contracts for the two following years provided additional rental or revenue by way of a charge based on the number of multiple jacks in each private branch exchange switchboard, this fact can have no bearing on the question whether the switchboard here involved fell within the General Supply Contract in force when it was ordered, and was constructed, installed, and put in use. If the switchboard was not within the contract then in force, but was contracted for independently, it could not be brought within the intent or scope of subsequent General Supply Contracts merely through an increase in the rental or charge provided for private branch exchange switchboards. Nor is this affected by the following provision found in the General Supply Contract for the year ending June 30, 1919:

> "The Secretary of the Treasury, by accepting rates and terms herein stated on behalf of the subscriber, agrees that *the equipment now in service* is covered by this contract." (Italics ours) (R. 16, End of Finding IV.)

Of course the words, "the equipment now in service," refer, and can refer, only to the equipment in service under the preceding General Supply Contract.

In addition to the foregoing reasons which we have

given in support of our contention that the switchboard in question is not within the meaning or intent of the General Supply Contract for the year ending June 30, 1918, during which year the switchboard was installed and put in use, it should further be observed that, on May 18, 1917, when this contract was entered into (R. 13), neither of the parties to the contract can fairly be said to have contemplated the necessity for a switchboard of any such magnitude. The Government urges that, as the telephone requirements of the War Department began to increase in February, 1917, and as the United States entered the World War in April of that year, both parties did or should have had such needs in mind; but to say this, ignores the plain facts of the situation, as disclosed by the record, for a switchboard of five positions was sufficient, until August, 1917, between three and four months after the execution of this contract, to take care of all the telephone requirements of the War Department. We are unable to see why the fact that the three-position private branch exchange number 4 switchboard, which had been sufficient for the War Department from 1908, until February, 1917, had been increased to a five-position switchboard at the time the General Supply Contract was executed in May, 1917, should have led either party to the contract to suppose that within less than a year and a half, a seventy-five position board would be required.

The situation as to the telephone service of the War Department was one for which no real or comparable precedent existed, and the fact that the three-position board which had served for some nine years had been increased sixty per cent. at the time the contract was signed would hardly lead one to suppose that an in-

crease of twenty-five hundred per cent. would become necessary during the course of the following eighteen months.

As was said by the Chief Justice of the Court below, in his dissenting opinion (R. 36-37):

> "There is no provision in the contracts even remotely suggesting that the contracts were designed to cover the development of a condition due to a war, or that the parties thereto contemplated the extraordinary and pronounced expansion of the service which subsequently occurred. Surely a contention that the supply contracts exacted the furnishing of a switchboard of the size and cost furnished the War Department to each and all the executive departments mentioned in the supply contracts would be untenable. It is obvious that such a burden was never intended by the parties to be assumed without remuneration. The very insignificance of the compensation to be paid for a private branch-exchange switchboard, to wit, $24 per annum, clearly indicates what the parties contemplated. It is true one of the supply contracts was executed when war was flagrant and the service on the increase, but it is equally true that the plaintiff performed without extra expense, except as the contract provided, what it agreed to do under these contracts until conditions rendered the impossibility of further performance. While the character of the service remained the same, and the subject-matter of the contracts did not change, it has been held by the courts that performance of additional service not within the contemplation of the parties when the contract was made, a service so vast in extent and so manifestly disproportionate as to characterize it as one distinct from the contract, may not be imposed upon a contractor without paying therefor. United

States v. Stage Co., 199 U. S. 414; O'Brien v. Miller, 168 U. S. 287."

PRIVATE BRANCH EXCHANGE AND CENTRAL OFFICE SWITCHBOARDS.

The General Supply Contracts now under consideration provide the rental which the Government was to pay for "Common battery private branch exchange switchboards." It clearly appears from the findings that the switchboard here sued upon was not of the private branch exchange type, but was of the type installed in a central-office exchange, that is, the central office type (R. Finding XIV, pp. 22-23).

It is true that the use to which this specially constructed central office type of switchboard was put was that of serving as a private branch exchange for the War Department; and one of the contentions of the Government is that, because it was put to a private branch exchange use, it was therefore a private branch exchange switch-board within the meaning of the General Supply Contract, although in fact, it was not a private branch exchange type, but a central-office type.

It does not appear that any central-office type of switchboard had ever been installed and used as a private branch exchange prior to the installation of the switchboard here in question; and how, therefore, it can be fairly argued that, by the use to which this switchboard was put, in order to meet the great and unusual needs of the War Department, it suddenly became a private branch exchange switchboard within the fair meaning and intent of the General Supply Contract, we are unable to see.

Under Points C, D and E of our former brief (pages 14 to 24), we discussed the sufficiency of the authority

of the contracting officials of the War Department, the facts from which a contract is implied in fact to compensate petitioner, and the proposition that, when the War Department accepted, and even after claim for compensation had been filed with the Secretary of War, continued to retain all the benefits of the contract, it cannot disavow its burdens. It seems to us unnecessary to add to our discussion of these matters.

One point, therefore, remains for discussion.

THE AMOUNT TO WHICH PETITIONER IS ENTITLED.

The Government brief in opposition to the petition for certiorari (page 9) refers to the great increase in the revenues received by petitioner. While this increase occurred, it must be remembered that the figures give gross revenue and do not take account of the tremendous expenditures made necessary by the great increase in the service required and the handling thereof.

Furthermore, the revenue received by petitioner is entirely immaterial and irrelevant to the claim here involved, as is also the contribution made to petitioner by the American Telephone and Telegraph Company (R. 25-27, Findings XXI, XXII, XXIII). It appears, from Finding XXI, that this contribution was made while petitioner's claim for the switchboard was pending before the Board of Contract Adjustment of the War Department, and furthermore, no contribution from the American Telephone and Telegraph Company to its subsidiary, the petitioner, could change the status of petitioner's rights against the Government.

We respectfully submit that Findings XVIII, XXI,

XXII, XXIII, XXIV and XXV can have no real bearing upon the merits of this case.

Finding XXIX (R. 28-29) contains the figures from which the amount to which petitioner is entitled is to be ascertained.

The total cost to petitioner of the switchboard and associated equipment and of the installation thereof was $401,113.34, not including cost of additional telephones, nor cost of miles of wiring to afford operation.

The net amount realized by petitioner from the salvaging of the switchboard and equipment was $206,-315.75. This is a proper deduction from the above item of cost.

For depreciation upon such of said switchboard and equipment as was in use by the War Department during the period of Federal control, August 1, 1918, to July 31, 1919, the Government paid petitioner the sum of $22,232.78, and as eight per cent return on the investment in said switchboard and equipment for that period, $25,671.00. The item of depreciation, $22,-232.78, is also a proper deduction from the above item of cost, in view of the subsequent salvaging of the board and equipment; but we respectfully submit that the item of return on the investment, $25,671.00, is not a proper deduction.

One other deduction, however, is proper, namely, the payments made by the War Department to the petitioner for the use of the switchboard and multiple jacks which amounted, in the aggregate, to $11,202.20.

The three amounts, which we have stated to be proper deductions aggregate the sum of $239,750.77, and deducting this amount from the item of cost, $401,-113.34, leaves a balance of $161,362.57, which petitioner is entitled to recover.

CONCLUSION.

For the reason stated in our earlier brief and in this one, we respectfully submit that the switchboard here in question was not within the meaning or intent of section 4 of the Act of June 17, 1910, nor of the General Supply Contracts made under the authority of that section; that the contracting officials of the War Department with whom petitioner dealt had sufficient authority to make the contract sued upon, that before the installation of the switchboard such officials had full notice from petitioner that, if the board were installed, the Government would be expected to pay the cost thereof less salvage, that the board was duly approved, constructed, installed, and put in use by the War Department, that the contract was duly ratified by the Secretary of War himself, and that the Government continued to enjoy all of the benefits of the contract till the board was no longer needed for the service of the War Department; and that, from these facts arises a contract, implied in fact, to compensate the petitioner as claimed.

We, therefore, respectfully submit that the judgment of the lower court is erroneous and should be reversed, and that the lower court should be directed to enter judgment in behalf of the petitioner for the sum of $161,362.57.

Respectfully submitted,

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